LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
SEP 23 1952
CHARLES ELMORE CROPLEY
CLERK

No. 18

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

L. A. TUCKER TRUCK LINES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 18

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

L. A. TUCKER TRUCK LINES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 88) is reported in 100 F. Supp. 432.

JURISDICTION

The final judgment of the district court was entered on December 7, 1951 (R. 94). The petition for appeal was presented and allowed on January 28, 1952 (R. 95-96). The jurisdiction of this Court

is conferred by 28 U.S.C. 1253, 2101(b) and 2325. Probable jurisdiction was noted on March 24, 1952 (R. 103).

QUESTION PRESENTED

Appellee, a motor carrier, intervened in proceedings before the Interstate Commerce Commission in opposition to an application, pursuant to Section 207(a) of Title II of the Interstate Commerce Act, by another motor carrier for a certificate of public convenience and necessity authorizing an extension and modification of the applicant's operating rights. The hearings were conducted by an examiner of the Commission not appointed pursuant to Section 11 of the Administrative Procedure Act. Appellee raised no question as to the examiner's qualifications at the time of the hearing, in the exceptions which it filed to the examiner's recommended report and order, in its petition for reconsideration of the order entered by a Division of the Commission, in its petition to the Commission for "extraordinary relief," or in the complaint which it filed in the court below to have the Commission's order set aside. More than eight months after institution of this suit, appellee filed a motion for leave to amend its complaint, by adding thereto the allegation that the Commission's order was void because the hearing examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act.

The question presented is whether an intervenor in a Commission proceeding is entitled to have the Commission's order set aside because the hearing

examiner had not been appointed pursuant to the Administrative Procedure Act, when the intervener did not raise this issue at any time during the administrative proceeding.

STATUTES INVOLVED

Section 207(a) of Part II [1] of the Interstate Commerce Act, 49 Stat. 543, 551, 49 U.S.C. 307(a), provides in part as follows:

> Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *.

The Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, provides in part as follows:

> Sec. 5. In every case required by statute to be determined on the record after opportunity for an agency hearing * * *—
>
> * * * * * *

[1] Part II of the Act applies to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce. Section 202(a) of Interstate Commerce Act, 49 U.S.C. 302(a).

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision * * *. * * * nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of any investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency. [5 U.S.C. 1004.]

* * * * *

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; * * *. * * * Any such officer may at any time with-

draw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case. [5 U.S.C. 1006.]

* * * * * *

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining ap-

plications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires. [5 U.S.C. 1007.]

* * * * *

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable.

* * *

STATEMENT

In June 1948, C. L. Cunningham, doing business as Pemiscot Motor Freight Co., filed with the Interstate Commerce Commission an application under 207(a) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it to operate as a common carrier by motor vehicle more extensively than was authorized by Pemiscot's existing certificate of convenience and necessity (R. 55). Ten motor carriers, including the appellee, as well as a railroad and its motor carrier affiliate, intervened in opposition to the application (R. 28, 32). A hearing on the application was held before an examiner of the Commission in January 1949, and the testimony of numerous supporting and opposing witnesses was received and 17 exhibits were introduced (R. 15, 18-22).

Following such hearing, the examiner submitted a recommended report and order (R. 14-26), and appellee and certain other interveners filed exceptions thereto (R. 2, 37). The matter came before Division 5 of the Commission, which filed a report on January 13, 1950, finding that Pemiscot was entitled to a certificate granting, with minor exceptions, the operating authority which it sought (R. 27, 38). Appellee's petition for reconsideration by the full Commission was denied on May 4, 1950, and its later petition for "extraordinary relief" was rejected on June 29, 1950 (R. 3). The Commission thereupon issued to Pemiscot a certificate of public convenience and necessity, dated

August 7, 1950, conforming to the findings made by Division 5 (R. 4, 43-44).

On September 12, 1950, appellee filed in the court below a petition to have the Commission's certificate to Pemiscot set aside "insofar as the matters herein complained of are concerned" (R. 1, 5). The ground upon which the certificate was attacked was that the evidence failed to show any need for transportation service by Pemiscot between St. Louis, Missouri, and Sikeston, Missouri (R. 3).[2]

The examiner who presided at the Commission hearing had not been appointed pursuant to Section 11 of the Administrative Procedure Act. No objection to the qualifications of the hearing examiner was made during the course of the administrative proceedings, either by the appellee or by any other party to the proceeding. Appellee likewise did not raise this issue when it instituted the present suit to have the Commission's order set aside. Appellee first raised this issue on May 25, 1951, when it filed with the district court a motion for leave to amend its petition (R. 49, 89). Appellee, in seeking to interject this new issue into the case, relied upon the ruling made by this Court in *Riss & Co.* v. *United States,* 341 U.S. 907. That *per curiam* ruling, rendered on April 16, 1951, held that hearings on applications for certificates of convenience and necessity under Section 207(a) of the Interstate Commerce Act are subject to the

---

[2] The St. Louis-Sikeston service was a relatively minor part of the additional operating authority conferred by the Commission's certificate (R. 43-44).

provisions of the Administrative Procedure Act governing the qualifications of officers who preside at the taking of evidence in administrative hearings.

The district court permitted appellee to amend its petition and, solely on the basis of the issue interjected by the amendment, entered judgment setting aside the Commission's order (R. 91). The court appears to have been of the opinion that the order of an administrative body is null and void if the officer who had presided at the taking of the evidence was not appointed in accordance with Section 11 of the Administrative Procedure Act (R. 89-90). The court also refused to give effect to the established rule that an administrative order may not be attacked upon grounds which were not presented to the administrative agency issuing the order.

SUMMARY OF ARGUMENT

In *Riss & Co.* v. *United States,* 341 U.S. 907, this Court held that hearing officers who conduct administrative hearings on applications for motor carrier certificates of public convenience and necessity under Section 207(a) of the Interstate Commerce Act must be appointed in accordance with Section 11 of the Administrative Procedure Act. However, in the instant case, it was error for the court below to set aside the Commission's grant of a certificate of public convenience and necessity in a suit brought by an intervening and competing carrier, on the ground that the administrative hearing was conducted by an officer who had not been

appointed pursuant to Section 11, where such objection was not raised in the proceedings before the Commission.

The appellee was charged with notice that the Interstate Commerce Commission was assigning motor carrier applications under Section 207(a) for hearing before officers who had not been appointed as hearing examiners pursuant to Section 11 of the Administrative Procedure Act. Also, the appellee had ample opportunity to raise this issue in the proceedings before the Commission.

Appellate courts regularly refuse to consider objections which were not presented to trial courts. Applying this analogy, Federal courts have long refused to consider objections to administrative action which were not presented to the administrative agency. This principle has been applied not only to questions of procedure, but also to the allegedly erroneous admission or exclusion of evidence and even to the alleged denial of rights guaranteed by the Constitution. In recent years, Congress has affirmed this principle of judicial administration by specifically providing in many Federal regulatory statutes that objections not presented to the administrative agency shall not be considered by the reviewing courts. The Federal courts have strictly enforced such statutory provisions and they have continued to apply their principle even in cases under statutes, such as the Interstate Commerce Act, which contain no such express provision.

The court below erroneously concluded that the conduct of the administrative hearing before an officer who was not appointed in accordance with Section 11 of the Administrative Procedure Act deprived the Commission of "jurisdiction" and rendered its order void. Clearly, the Commission had jurisdiction in the true sense that it was expressly empowered by Congress to determine whether an application for a certificate of public convenience and necessity under Section 207 should be granted over the appellee's objection. Moreover, even true issues of "jurisdiction" must be raised before the administrative agency before they may be considered by the courts, just as the agency's alleged lack of jurisdiction does not justify a complete failure to exhaust administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. Specifically, this Court and the lower Federal courts have repeatedly held that the failure to raise promptly the alleged disqualification of Federal trial judges or administrative hearing officers, even on such prejudicial grounds as bias or interest, precludes consideration of such objections by appellate or reviewing courts. Moreover, administrative hearing officers play far less decisive roles than Federal judges, particularly in proceedings on applications for "initial licenses," as in the instant case. Section 7(a) of the Administrative Procedure Act expressly requires timely objection to the qualifications of hearing officers.

The fact that the Interstate Commerce Commission had previously, prior to this Court's decision in the *Riss* case, taken the position that proceedings under Section 207 were not governed by the Administrative Procedure Act does not justify the appellee's failure to present its objection to the Commission. This Court has held that possibilities of administrative relief or reconsideration must be exhausted notwithstanding the fact that the administrative agency has already taken a position on the matter in issue.

Under any balancing of equities in this and similar cases, the absence of injury to the appellee, coupled with the expense and inconvenience to other parties and to the Commission of rehearings, requires application of the rule that courts will not consider objections which were not presented to the administrative agency. The appellee does not even assert that it was actually prejudiced by the fact that the administrative hearing was conducted by a hearing officer who had not been appointed pursuant to Section 11. Moreover, the application of the Administrative Procedure Act to cases under Section 207(a) of the Interstate Commerce Act is so limited that prejudice cannot be presumed. In the instant case, the application for a modification and extension of motor carrier operating authority was an application for an "initial license," as in the case of an application for an original certificate of public convenience and necessity. Section 5(c) of the Administrative Procedure Act exempts from the separation of functions re-

quirements of the Act the determination of "applications for initial licenses." Similarly, the requirement of Sections 5(c) and 8(a) that in cases of adjudication the intermediate or recommended decision must be prepared by the hearing officer who heard the evidence, is modified by Section 8(a) which provides that in determining applications for initial licenses the agency may itself issue a tentative decision or any of its responsible officers may make the recommended decision. That is, the Administrative Procedure Act has its lightest impact in cases such as the instant case.

Consistent with the rationale of these significant exceptions for determining "applications for initial licenses," the Commission's role in proceedings under Section 207(a) is entirely non-adversary in the great majority of cases. Typically, the Commission relies upon the applicant and its intervening competitors to adduce the evidence and the Commission acts as the arbiter of competing economic interests, rather than as a prosecutor-judge. Cf. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. Thus, not only is the instant type of case in large part exempt from the Administrative Procedure Act, but also it does not present the conditions at which the Act was directed. Under these circumstances, it cannot be presumed that the appellee was prejudiced by the proceedings before the Commission in which it participated without objection.

On the other hand, if the decision below is affirmed, there will be opened to challenge, unless barred by laches, approximately 2,500 motor com-

mon carrier certificates issued under Section 207(a) and contract carrier permits under the similar provisions of Section 209. In addition to the expense to the Commission of a substantial number of rehearings, motor carriers who have extended service and made investments in reliance upon such authorizations will be harassed by the inconvenience and expense of new hearings. Assuming, therefore, that questions which were not presented to the administrative agency can be considered by a reviewing court to avoid obvious and substantial injustice, no such showing can be made here. Rather, the considerations which invoke the doctrine of laches require that the appellee's failure to object to the hearing officer's qualifications during the proceedings before the Commission bar consideration of that objection by the courts.

ARGUMENT

The District Court Erred in Setting Aside the Commission's Order Upon the Ground That the Hearing Officer Was Not Appointed in Accordance with Section 11 of the Administrative Procedure Act, Where No Such Objection Was Made During the Proceedings Before the Commission

We contend that the court below erred in setting aside the Commission's order on the ground that the administrative hearing was conducted by a hearing examiner who was not appointed in accordance with Section 11 of the Administrative Procedure Act, where that objection was not raised during the proceedings before the Commission. This issue was neither presented to nor decided by

this Court in *Riss & Co.* v. *United States*, 341 U. S. 907, since in that case the objection to the examiner's qualifications had been specifically raised during the Commission proceedings, once during the hearing and again by Riss' petition for reconsideration.[3] Since the *Riss* decision, the Interstate Commerce Commission has conducted proceedings under Section 207 (a) of the Interstate Commerce Act in full compliance with the Administrative Procedure Act, and we are not seeking to reargue the *Riss* case. The instant case is concerned only with the validity of hundreds of orders issued by the Commission under Section 207 (a) prior to the *Riss* decision, and after proceedings in which none of the parties objected to the qualifications of the Commission's hearing officers.

A. *The appellee had ample opportunity during the proceedings before the Commission to object to the hearing officer's qualifications.*

The appellee was charged with knowledge, during the pendency of the Commission proceeding, that the Commission interpreted the hearing-officer requirements of the Administrative Pro-

[3] In the *Riss* case Riss itself had sought a certificate of convenience and necessity to extend its own operations, and discovered on the last day of the hearings that the examiner had not been appointed under the Administrative Procedure Act. Riss formally objected to the conduct of the proceedings on this ground. The objection was disallowed, and Division 5 of the Commission, following the examiner's recommendation, denied the certificate application on the merits. The full Commission denied a petition for reconsideration in which the examiner issue was again raised.

cedure Act as not applying to hearings on applications for certificates of convenience and necessity under Section 207(a) of the Interstate Commerce Act. Moreover, appellee had ample opportunity to raise before the Commission the question of whether the hearing officer had been appointed an examiner pursuant to Section 11 and ample opportunity to object upon the ground that he had not been so appointed.

The provisions of Sections 5, 7, 8 and 11 of the Administrative Procedure Act apply to cases of adjudication (and rule making) "required by statute to be determined on the record after opportunity for an agency hearing." Upon the enactment of the Administrative Procedure Act, the Department of Justice took the position that the quoted language from Section 5 made Sections 5, 7, 8 and 11 "applicable only where Congress has otherwise specifically required a hearing to be held."[4] Consistent with this interpretation, and since Section 207 (a) of the Interstate Commerce Act does not in terms require a hearing on applications for motor carrier certificates of public convenience and necessity, the Commission concluded that administrative hearings on such applications were not governed by the Administrative Procedure Act.

On February 20, 1950, this Court held, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, that the ref-

---

[4] *The Attorney General's Manual on the Administrative Procedure Act* (1947) p. 41.

erence in Section 5 to hearings "required by statute" included hearings "the requirement for which has been read into a statute by the Court in order to save the statute from invalidity." 339 U. S. at 50. The *Sung* case was decided *after* the hearing before the hearing examiner in this case and in many similar cases had been completed and, in many cases, after the Commission had issued final orders in such cases. Also, the *Sung* case related to deportation proceedings under the Immigration Act in which it had been held that due process of law required an opportunity for hearing, while it had not been authoritatively determined that due process required opportunity for a hearing on an application for a certificate of public convenience and necessity, i.e., a license.

In the meantime, Riss & Co. and various other parties to proceedings under Section 207(a) had objected during the administrative proceedings to the qualifications of the Commission's hearing officers, and the Commission had uniformly overruled such objections. Moreover, the opinion in *Riss & Co.* v. *Interstate Commerce Commission*, 179 F. 2d 810 (C.A.D.C.), decided on January 12, 1950, recited that the Commission had ruled that Section 5 of the Administrative Procedure Act does not apply to proceedings under Section 207(a) of the Interstate Commerce Act. On October 17, 1950, a three-judge district court held in *Riss & Co.* v. *United States*, 96 F. Supp. 452, that hearings in cases under Section 207(a) were not governed by the Administrative Procedure Act

and, therefore, need not be conducted by examiners appointed under Section 11.

Appellee was given advance notice of who was to preside at the hearing on January 27, 1949.[5] Appellee therefore had opportunity, at the outset, to object. Furthermore, appellee actively participated in the administrative proceeding, which continued at least until June 29, 1950.[6] In August 1949 appellee filed exceptions to the examiner's recommended report and order (R. 66); in March 1950 it filed a petition for reconsideration of the report and order of Division 5 (R. 83); and in June 1950 it filed a further petition for relief (R. 80). At none of these times did the appellee object to the hearing officer's qualifications, although in January 1950 the Court of Appeals for the District of Columbia referred in its opinion to the Commission's view that the Administrative Procedure Act was inapplicable.

At any time during this period appellee might easily have ascertained that the hearing officer had not been appointed an examiner pursuant to Section 11. A letter of inquiry addressed to the Interstate Commerce Commission or to the Civil Service Commission would have elicited this information.

---

[5] On January 11, 1949, the Commission mailed to appellee a copy of its order referring Pemiscot's application to "Examiner C. I. Kephart" for hearing on January 27, 1949.

[6] This was the date on which the Commission rejected appellee's petition for "extraordinary relief" (*supra*, p. 7). Perhaps the administrative action should not be regarded as final until August 7, 1950, the date on which the Commission issued a certificate of convenience and necessity granting to Pemiscot additional operating authority (R. 43-44).

Indeed, inquiry of the Commission was the means by which appellee obtained its information in May 1951, when it first interjected the issue of the qualifications of the Commission's hearing officer, by moving in the court below for leave to amend its petition to have the Commission's orders set aside or modified.[7]

B. *Since the appellee failed to object to the hearing officer's lack of qualifications during the proceedings before the Commission, the Commission's order could not be set aside on that ground.*

The court below should have refused to consider the objection, raised for the first time in that court, that the hearing officer who presided over the administrative hearing had not been appointed pursuant to Section 11 of the Administrative Procedure Act. In reviewing action of an administrative agency taken after a hearing, courts will not consider issues which were not presented to the agency. This rule has been applied where inadmissible evidence has been received without objection. *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 130; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 155. Such constitutional rights as

---

[7] The motion was made on May 25, 1951 (R. 49). On May 19, 1951, appellee's counsel had sent a telegram to the Commission asking whether at the time of the hearing on January 27, 1949, the Commission's hearing officer had been appointed an examiner pursuant to Section 11 of the Administrative Procedure Act. By letter dated May 21, 1951, the Commission replied in the negative.

the privilege against self-incrimination are deemed waived by the failure to assert them during the administrative proceeding. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113. The rule has been applied to require that newly acquired evidence be offered to the administrative agency promptly. Thus, *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, was an appeal from a district court decision enjoining enforcement of an Interstate Commerce Commission order establishing rates on petroleum. The basis for the injunction was that the Commission had abused its discretion in refusing to reopen the proceeding and receive proof of changes in economic conditions arising after the closing of evidence. In reversing the decision, the Supreme Court said (p. 494):

> Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

In the *Spiller, Vajtauer* and *Northern Pacific* cases, this Court was applying by analogy the rule that an appellate court will not consider issues which were not presented to the trial court.

Congress has repeatedly affirmed this judicially formulated rule by writing it into many recent regulatory statutes. Thus, in the Securities Act of 1933[8] Congress specifically provided that, "No objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission." An identical provision was inserted in the Securities Exchange Act of 1934,[9] while the Public Utility Holding Company Act,[10] the Investment Companies Act[11] and the Fair Labor Standards Act[12] provide that "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do." The National Labor Relations Act,[13] both as originally enacted and as amended in 1947, has provided that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Such statutory commands

[8] 48 Stat. 74; 15 U.S.C. 77a, 77i.
[9] 15 U.S.C. 78y.
[10] 15 U.S.C. 79x.
[11] 15 U.S.C. 80a-42.
[12] 29 U.S.C. 210.
[13] 29 U.S.C. 160(e).

have been fully enforced by this Court. In *Marshall Field & Co.* v. *N.L.R.B.*, 318 U. S. 253, 255-256, this Court stated that such a provision makes "presentation [of an objection] to the Board a prerequisite to judicial review." In *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 389, it was said that "By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested." [14]

After, as well as before, the appearance of such statutory provisions, the courts have applied the rule in the review of administrative action pursuant to statutes containing no such provision. Thus, in *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291, this Court refused to consider the contention that the rates fixed by the Interstate Commerce Commission were confiscatory, upon the ground that this issue had not been properly presented to the Commission and therefore was not "ripe for judicial review." See also *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 525. In suits to set aside orders of the Interstate Commerce Commission, specially-constituted three-judge district courts have consistently refused to consider objections which had not been presented to the Commission. *W. J. Dillner Transfer Co.* v. *United*

---

[14] Accord, *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376, 386, n. 5; *N.L.R.B.* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 341.

States, 101 F. Supp. 506, 509-510 (W. D. Pa.), now pending on appeal to this Court, No. 77; *Carolina Scenic Coach Lines* v. *United States,* 56 F. Supp. 801, 804-805 (W.D. N.C.), affirmed, 323 U. S. 678; *General Transportation Co.* v. *United States,* 65 F. Supp. 981, 984 (D. Mass.), affirmed, 329 U.S. 668; *Transamerican Freight Lines* v. *United States,* 51 F. Supp. 405, 412 (D. Del.).

In applying the rule to the appellate review of lower court decisions, this Court has stated that "This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson,* 297 U. S. 157, 159. To the extent that administrative agencies and courts are coordinate branches of government rather than members of the same hierarchy, *F.C.C.* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 143-144, the reasons for requiring that objections be presented initially to the administrative agency are even more compelling. As this Court put it, in *Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U.S. 143, 155, "A review court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."

The application of the rule to the instant case may not be avoided upon the theory that the Com-

mission was deprived of "jurisdiction" [15] and its order was void because the hearing examiner was not appointed pursuant to Section 11 of the Administrative Procedure Act. The Commission admittedly had "jurisdiction" in the true sense that it was empowered by Congress to decide whether Cunningham's application should be granted over the appellee's objections. In any event, even if a genuine issue of jurisdiction were involved, the appellee could not raise such issue for the first time in the reviewing court, just as a party complaining of administrative action cannot obtain relief from the courts if it has altogether ignored its administrative remedy. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley* v. *Waterman S.S. Corp.*, 327 U. S. 540. Thus, in the *Myers* case an employer was required to present first to the National Labor Relations Board its claim that it was not engaged in interstate commerce and was therefore not subject to the National Labor Relations Act. Similarly, in the *Macauley* case, a claim that certain contracts were not subject to the Renegotiation Act was required to be presented first to the administrative agency. In both cases, it is clear that if, as in this case, there had been administrative hearings plus a failure to raise such "jurisdictional" issues during the hearings, the courts would have refused to consider such issues.

The court below relied heavily upon the decision of a California District Court of Appeals in *Na-*

[15] See dissenting opinion in *Yonkers* v. *United States*, 320 U.S. 685, 695.

tional Automobile & Casualty Ins. Co. v. *Downey*, 98 Cal. App. 2d 586, 220 P. 2d 962. In that case, a California statute prescribing qualifications for administrative hearing officers was enacted prior to the commencement of the administrative hearing in question, but did not become effective until after the hearing had been in progress for three months. The officer conducting the hearing admittedly lacked the new statutory qualifications and, absent a saving clause in the statute, the California court set aside the order which resulted from the administrative hearing. While in that case the State contended that there had been no timely request for the appointment of a qualified hearing officer, the court pointed out that during the administrative hearing and as soon as the statute became effective, the private party had repeatedly raised the issue of its application. Thus, the decision has no bearing on this case.

More persuasive analogies lie in the decisions of the Federal courts as to the validity of the official acts of judges whose disqualifications were not timely challenged. Thus, the alleged disqualification of a Federal judge for bias or interest under Sections 20 and 21 of the Judicial Code (now 28 U.S.C. 144, 455) is waived by failure to object during the proceedings before such judge, and his official acts performed without timely objection are valid. *Laughlin* v. *United States*, 151 F. 2d 281 (C.A. D.C.), certiorari denied, 326 U.S. 777; *Kramer* v. *United States*, 166 F. 2d 515 (C.A. 9); *In re Fox West Coast Theatres*, 25 F. Supp. 250,

259 (S.D. Cal.), affirmed, 88 F. 2d 212 (C.A. 9), certiorari denied, 301 U.S. 710, rehearing denied, 302 U.S. 772; *Borough of Hasbrouck Heights, N. J.* v. *Agrios*, 10 F. Supp. 371, 374 (D. N.J.).

A similar rule of waiver has developed under what is now 28 U.S.C. 47, which presently reads that, "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." While this Court has held that litigants may not by their consent enable the trial judge to participate in the decision of the case in the Court of Appeals, *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U. S. 339, 344; *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, 228 U. S. 645, 650, it later said, in *Delaney* v. *United States*, 263 U. S. 586, 588-589:

> The section seems not to have attracted the attention or appreciation of petitioner until he had experimented with other means of review and relief from the conviction adjudged against him. It may be that he did not thereby waive the section which may express a policy and solicitude in the law to keep its tribunals free from bias or prejudgment, rather than to afford a remedy to a litigant, yet it would seem that he should not be permitted to assume the competency of the tribunal to decide for him and its incompetency to decide against him. His action certainly suggests the idea that it was an afterthought with him that he was at any time in the situation from which the section was intended to relieve.

Since the *Delaney* case, the Courts of Appeals for the Fifth and Seventh Circuits have held that this

objection is raised too late by a petition for rehearing in the Court of Appeals. *Tinkoff* v. *United States,* 86 F. 2d 868, 884 (C. A. 7), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715; *Lee* v. *United States,* 91 F. 2d 326, 332 (C.A. 5), certiorari denied, 302 U. S. 745.

Since actual bias, interest or disqualifications under 28 U.S.C. 47 is to be deemed waived in the absence of a timely objection, it follows that the objection that a hearing examiner was not appointed in accordance with Section 11 of the Administrative Procedure Act—a circumstance which is not even alleged to have actually prejudiced the appellee—should also be considered as waived by the failure to raise it. Moreover, since hearing examiners employed by Federal administrative agencies play far less decisive roles than Federal judges,[16] there is the greater reason to insist upon timely objection to their qualifications.

In proceedings under Section 207 (a) the analogy of the Commission and its examiners to judges is usually accurate. An application for a certificate of public convenience and necessity authorizing new motor carrier operations customarily touches the competitive interests of numerous other carriers. These carriers routinely intervene in such

[16] This is true even under the holding of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 496, that depending "largely on the importance of credibility in the particular case", "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

proceedings for the protection of their interests. The Commission makes no independent pre-hearing investigation of applications, but leaves it to the carriers concerned to adduce evidence pro and con on the issues of convenience and necessity and the qualifications of the applicant. Only rarely, as in the *Riss* case, is the Commission represented by counsel in the hearing before the examiner. That is, these are not cases in which, as in the deportation proceedings involved in *Wong Yang Sung* v. *McGrath, supra,* the dispute is between individuals and the Government; rather, the Commission is acting as arbiter between conflicting private economic interests. This typically non-adversary role of the Commission in proceedings under Section 207 (a) (which the Administrative Procedure Act recognizes in its significant exceptions for proceedings on applications for initial licenses, *infra,* pp. 33-35) warrants application of the analogous rule that a failure to challenge a Federal judge as disqualified constitutes a waiver of such objection. Here, as in judicial proceedings, belated objections chiefly serve to harass the other private parties to the proceedings—such as the applicant for a certificate in this case.

It should also be noted that the decision below is in square conflict with recent decisions of other Federal courts. In *W. J. Dillner Transfer Co.* v. *United States*, 101 F. Supp. 506, 509 (W. D. Pa.), which also involved an order of the Interstate Commerce Commission under Section 207 (a), a three-judge district court held that failure to object to

the examiner's qualifications during the proceedings before the Commission "bars review of such objections when raised for the first time in a judicial proceeding of this type."[17] Also, the Court of Appeals for the District of Columbia Circuit, in *Democratic Printing Co.* v. *Federal Communications Commission*, decided June 12, 1952, held that the legislative history of the Act "clearly indicates" that compliance with the hearing-officer requirements of the Act may be waived. The Court of Appeals concluded that failure to object to the administrative agency, in the face of knowledge that these requirements were not being applied, was "waiver by non-action" which barred pressing the objection in a suit to upset the administrative order. However, in *Pinkett et al.* v. *United States*, 105 F. Supp. 67 (D. Md.), a three-judge district court reached the same result as the court below in the instant case.

Moreover, this Court has recently held that the alleged disqualification of an administrative hearing officer is not jurisdictional in the sense that it invalidates administrative action even in the absence of timely objection. In *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 583-584, foonote 4, this Court said:

> * * * Harisiades also contends that, the Administrative Procedure Act aside, he was denied procedural due process in that in his 1946-47 hearings the same individual acted

[17] Appeal from the decision is now pending, No. 77, this Term.

both as presiding officer and examining officer. However, it appears that the officer here performed both functions with Harisiades' consent. He, therefore, has no standing to raise the objection now.

It is significant that Section 7(a) of the Administrative Procedure Act provides that "upon the filing in good faith of a *timely* and sufficient affidavit of personal bias or disqualification of any such [hearing] officer, the agency shall determine the matter as a part of the record and decision in the case" (emphasis supplied). While it may be that "disqualification" was not intended to refer specifically to non-appointment pursuant to Section 11, the quoted provision clearly reflects a general policy that objections to the qualifications of hearing officers shall be made promptly, rather than belatedly after gambling on a favorable decision.[18]

The fact that prior to the administrative proceedings in this case the Commission had taken the position that proceedings under Section 207(a) of Part

[18] Perhaps Section 7(a)'s requirement of timely objection is limited to situations where the chances of actual prejudice to the parties are slight. Thus, the reports of the Senate and House Committees on the Judiciary state that, "If it [bias or disqualification] appeared or were discovered late, it would have the effect—where issues of fact or discretion were important and the conduct and demeanor of witnesses relevant in determining them—of rendering the recommended decisions or initial decisions of such officers invalid." Administrative Procedure Act, Legislative History, Senate Doc. 248, 79th Cong., 2d Sess., pp. 207, 269. However, the conduct and demeanor of witnesses is not a significant factor in cases under Section 207(a) and, as pointed out, *infra*, the Administrative Procedure Act does not require the hearing officer in such cases to prepare the intermediate decision.

II of the Interstate Commerce Act were not governed by the Administrative Procedure Act, does not excuse the appellee's failure to raise the issue before the Commission. Where prior resort to an administrative agency is a prerequisite to judicial consideraiton of certain issues, the possibility or probability that the administrative agency will maintain a position which it has taken in earlier cases will not justify a failure to raise such issues before the agency. *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 487-488; *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-208. In the *U. S. Navigation Co.* case, this Court insisted upon resort to the primary jurisdiction of the United States Shipping Board against a claim that in another case the Board had already resolved the same issue in favor of the claimant. In the *Gilchrist* case, the plaintiff had applied to a New York administrative agency for a rate increase and thereafter had commenced a suit in the District Court seeking to enjoin the maintenance of the existing five cent fare. On the day the suit was begun, the Transit Commission held that it lacked power to change the rate. Although the Commission had "long held the view that it lacks power to change the five cent rate established by contract" (279 U.S. at 211), this Court held that "the Interborough Company could not have resorted to a federal court without first applying to the Commission as prescribed by the statute. And having made such an application it could not defeat orderly action by alieging an intent to deny the relief sought."

(279 U.S. at 208-209.)[19] The decision in *Gilchrist* should control the instant case.

Moreover, in the instant case it is by no means clear that it would have been futile to challenge the qualifications of the hearing officer during the proceedings before the Commission. While the Commission had already taken the position that such hearings were not required to be conducted before an examiner appointed pursuant to Section 11 of the Administrative Procedure Act, the Commission might have assigned such an examiner to this case if a timely demand had been made, particularly if the other parties to the proceeding had joined in such request. More important, if a substantial number of parties to similar proceedings under Section 207(a) had made early objections to the conduct of such proceedings by examiners not appointed under Section 11, the Commission might well have reconsidered its position, or decided to eliminate the issue by assigning Section 11 examiners to hear cases in which the issue was raised.

---

[19] A case which is cited as opposed to *Gilchrist* is *City Bank Co. v. Schnader*, 291 U.S. 24. See Davis, *Administrative Law* (1951) p. 627. However, the result in the *City Bank Co.* case may reflect the fact that exhaustion of the state remedies would have deprived the plaintiff of access to the Federal courts. For a criticism of the case, see Berger, *Exhaustion of Administrative Remedies*, 48 Yale L. J. 981, 991.

C. *Where, as here, the alleged procedural defect did not injure appellee and reheqring would prejudice other parties, there should be no departure from the rule that objections not presented to the administrative agency will not be considered by the courts*

Appellee has never even alleged that it was actually prejudiced by the fact that the Cunningham application had been heard before an examiner not appointed in accordance with Section 11, and in proceedings under Section 207(a) it is doubtful whether such prejudice would ever exist (see *supra,* pp. 27-28). Furthermore, the major requirements of the Administrative Procedure Act relating to the functions of hearing officers are not applicable to this type of proceeding.

The Act undertakes to enhance the independence and responsible role of hearing officers in three ways. By Section 5(c) it isolates hearing officers in cases of adjudication from control or influence by agency employees engaged in investigating or prosecuting functions. By Sections 5(c) and 8(a) it requires that the officer who received the evidence make the initial or recommended decision. By Section 11 it places control of their compensation and tenure in the Civil Service Commission. The determination of applications for "initial licenses" is, however, expressly excluded from the requirements of Sections 5(c) and 8(a), and the application before the Interstate Commerce Com-

mission in the present case came within this exception. Thus, the last sentence of Section 5(c) wholly exempts from the separation of functions requirements of that subsection the determination of applications for "initial licenses." Also, Section 8(a) specifically provides that "in * * * determining applications for initial licenses" the administrative agency may substitute for a report prepared by the examiner who conducted the hearing either a tentative decision by the agency itself or a recommended decision prepared by "any of its responsible officers".

An application for a certificate of public convenience and necessity under Section 207(a) of the Interstate Commerce Act is an application for a "license" within the meaning of the Administrative Procedure Act.[20] Such an application is for an "initial" license whether the applicant presently has no certificate of convenience and necessity or, as here, seeks modification and extension of certificates already held.[21] It follows that hearings on applications under Section 207(a)

---

[20] Section 2(e) of the Act defines "license" as including "certificate".

[21] The application by Cunningham sought authority to furnish regular, in place of irregular, motor carrier service, and to serve additional points. The reasons for concluding that an application for modification or extension of an existing license, as distinguished from an application for renewal of a license or an uninvited modification of a license, should be treated as an application for an "initial license," are set forth in detail in *The Attorney General's Manual on the Administrative Procedure Act* (1947) pp. 50-53; Davis, *Administrative Law* (1951) p. 432; Ginnane *"Rule Making", "Adjudication" and Exemptions Under the Administrative Procedure Act*, 95 U. of Pa. L.R. 621, 639-641.

are not subject to the separation of functions requirements of the Administrative Procedure Act and that the recommended decision need not be made by the officer who conducted the hearing. In these applications, therefore, the only hearing officer requirement of the Act is that the officer presiding at the taking of evidence should have been appointed pursuant to Section 11.

The requirement of appointment of examiners in accordance with Section 11, while its importance is not to be minimized, subserves the long-range objectives of the Act rather than the immediate interests of the parties to administrative proceedings. In circumstances such as those of the instant case, where the hearing for the taking of evidence and all subsequent administrative steps had been concluded without suggestion of any prejudicial procedural taint, we submit that the basic objective of the Administrative Procedure Act would be defeated rather than promoted by a holding that an intervenor in the administrative proceeding may later come into court and obtain a judgment declaring the prior administrative action null and void. Section 10(e) of the Administrative Procedure Act expressly provides that in the judicial review of administrative action "due account shall be taken of the rule of prejudicial error".

If it should be held that the Interstate Commerce Commission's failure to use Section 11 examiners invalidates its action in these Section 207(a) cases, and in similar contract carrier permit cases under Section 209, at the suit of

parties who made no timely objection during the administrative proceedings, there will be opened to challenge the Commission's orders in about 5,000 cases commenced after June 11, 1947, and completed before this Court's decision in the *Riss* case. In these cases, the Commission granted approximately 2,500 common carrier certificates of public convenience and necessity and contract carrier permits.[22] The instant decision casts doubt upon the validity of all of these certificates and permits. Although the court below referred to the Commission's action in this case as "void" (R. 90), we assume that the validity of such certificates and permits is not open to collateral attack. However, even on that assumption, since there is no statute of limitations in proceedings to set aside Interstate Commerce Commission orders, unsuccessful protestants may, for a presumably indefinite period, subject only to the doctrine of laches, judicially challenge their competitors' operating authority. Ten more court cases raising the examiner issue already have been filed. In addition, since the decisions in the *Riss* case and the instant case, about 50 petitions for reconsideration have been filed with the Commission seeking rehearing before an examiner appointed pursuant to the Administrative Procedure Act. Moreover, there were many unsuccessful applicants for certificates or permits during this period who would

---

[22] Sixty-fifth Annual Report of the Interstate Commerce Commission (November 1, 1951) p. 52.

be entitled to reopen their cases under the instant decision.

While no one can predict the number of Section 207(a) cases in which rehearing would be required if the decision below should be affirmed, there can be no doubt that the number would be substantial. In addition to the cost and burden to the Commission, motor carriers which have been awarded certificates or permits in these cases, and which have made investments and inaugurated or extended motor carrier service in reliance upon such authorizations, would be put to the expense and inconvenience of again justifying the issuance of certificates to them. This simply emphasizes that these contested motor carrier cases usually involve a clash between competing motor carriers, and not a dispute between government and individuals. In the cases where certificates have been issued, these belated objections by protesting competitors to the qualifications of hearing officers involve the same considerations which invoke application of the equitable doctrine of laches. *United States ex rel. Arant* v. *Lane;* 249 U. S. 367.

In the cases in which the Commission denied applications for certificates in whole or in part, the decision below is unnecessary to protect the interests of such applicants. If rehearing is required, the applicant's presentation would not be limited to the facts and circumstances existing on the date of his original application. If they have substantially changed, the applicant can apply for a reopening of the earlier hearing. If they have not

changed, it would be a rare case in which a hearing before a different hearing officer would produce a different result.

In determining whether, in the situation here presented, there should be adherence to the rule that in reviewing administrative action courts will not consider objections which were not presented to the administrative agency, it may be appropriate to balance the equities and interests of the various parties affected. See *Hormel* v. *Helvering*, 312 U. S. 552, 556-557. We submit that any balancing of the equities in this and similar cases under Section 207(a) calls for adherence to the general rule. The absence of any showing or likelihood of actual prejudice to those who belatedly object to the hearing officers' qualifications, the injury to other parties who have acted in reliance upon the lack of timely objections, and the cost to the Commission and to affected motor carriers of futile rehearings, compel the conclusion that parties to proceedings under Section 207(a) who failed to challenge the qualifications of the hearing officers during the administrative proceedings, should not be allowed to do so for the first time in the courts.

As a matter of fact, following this Court's decision in the *Riss* case, a large number of the Commission's motor carrier examiners, including examiner Kephart who heard this application, were appointed hearing examiners under Section 11. While it would not be true in this case, as Examiner Kephart has retired, undoubtedly the rehearings required in a large number of cases if the decision of

the lower court is affirmed might well be before the same examiners who heard the cases originally, as familiarity with the issues and the record would be an important factor in assigning the cases for rehearing.

In those cases in which the objection was made during the hearing before the examiner the Commission will order a rehearing upon the application of any party to the original hearing. Where the objection was not raised until after the hearing before the examiner, as by exceptions to his recommended report or petitions for reconsideration by the Commission, the Commission, in accordance with its established practice of not considering issues which were not raised before its examiner, proposes to deny rehearings. Sixty-fifth Annual Report of the Interstate Commerce Commission, pp. 52-53.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the court below should be reversed.

ROBERT L. STERN,
Acting Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

ROBERT W. GINNANE,
CHARLES H. WESTON,
Special Assistants to the Attorney General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

SEPTEMBER, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 223139 383